IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

LOUIS J. CAPANO, III,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 10C-11-228 WCC
	)	
DARIN A. LOCKWOOD and DON A. LOCKWOOD, jointly and severally,	)	
	)	
Defendants.	)	

Submitted: February 20, 2013
Decided: May 31, 2013

Defendant Darin A. Lockwood's Motion for Summary Judgment – DENIED
Defendant Donald A. Lockwood's Cross-Motion for Summary Judgment – DENIED
Plaintiff Louis J. Capano, III's Cross-Motion for Summary Judgment – DENIED

MEMORANDUM OPINION

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CARPENTER, J.

Before this Court are the following three (3) motions: 1) Darin A. Lockwood's Motion for Summary Judgment; 2) Donald A. Lockwood's Cross-Motion for Summary Judgment; and 3) Louis J. Capano, III's (the "Plaintiff") Cross-Motion for Summary Judgment. At issue is the enforceability of the terms of the December 17, 2004 Contribution Agreement ("2004 CA"), which was entered into by and among the Plaintiff, the Lockwood Defendants, and Louis J. Capano, Jr.

The Court finds that, under the circumstances of this case, all motions before the Court are hereby **DENIED**.

FACTUAL BACKGROUND

The motions currently before the Court arise from a failed business venture that dates back to 2004. Specifically, the Plaintiff and Louis J. Capano, Jr. formed a company, Milton Investments, LLC ("Milton"), in which they were the sole members. Additionally, the Lockwood Defendants formed a company, Lockwood Brothers II, LLC ("LBII"), in which they were the sole members. In December 2004, Darin Lockwood and the Plaintiff as authorized by members of their respective companies, LBII and Milton, signed an agreement to form a new company, North Milton Development Group, LLC ("NMDG"). Under NMDG, a series of agreements were negotiated and executed in connection with the purchase of land known as the "Rust property" located outside of Milton, Delaware. The

parties intended to use the Rust property for both commercial and residential real estate development.

In order to purchase the Rust property, Milton and LBII entered into a loan agreement with Wilmington Trust ("WTC") in which WTC made two (2) loans to NMDG: 1) a December 17, 2004 acquisition loan for $7,130,000.00; and 2) an October 15, 2007 loan for $1,000,000.00. The $7.13M acquisition loan obtained for the purchase was guaranteed by the principals of Milton and LBII. The day prior to NMDG's formation, the principals of Milton and LBII also entered into the 2004 CA, which was intended to not only guarantee the loan from WTC but also give the parties a right of contribution in the event that WTC made a demand on one or more of the guarantors.

Although WTC loaned over $8 million to NMDG, the downturn in the housing market precluded the development project from proceeding as planned. As a result, the land has largely remained farmland that has been rented out for agricultural purposes. However, because the land's rental income of approximately $15,000.00 was insufficient to pay the monthly interest on the loan, WTC began billing NMDG for the monthly interest on the loans. Beginning with installment payments due on September 1, 2010 and continuing thereafter, WTC demanded that the Plaintiff and the Lockwood Defendants pay these bills. Despite these

demands, the Lockwood Defendants did not make their share of the payments and, as a result, the Plaintiff paid the entirety of the payments during that period, which totaled $109,754.49.

PROCEDURAL BACKGROUND

On December 20, 2012, Darin Lockwood filed a Motion for Summary Judgment, claiming that the 2004 CA's condition precedent has never been satisfied and, therefore, the Plaintiff cannot seek contribution from him. Alternatively, Darin Lockwood argued that the Plaintiff has released any and all claims against him pursuant to the Membership Redemption Agreement ("MRA") executed in May 2011. As such, Darin Lockwood asserts there is no genuine issue of any material fact and, accordingly, seeks judgment as a matter of law.

On February 4, 2013, the Plaintiff filed a Cross-Motion for Summary Judgment. In support of this Motion, the Plaintiff cites to the 2004 CA and contends that he is entitled to fifty percent (50%) contribution from the Lockwood Defendants for payments that he made to WTC as a result of their failed business venture. Therefore, the Plaintiff seeks judgment to be entered against the Lockwood Defendants for their share of the bank payments and post-judgment interest at the maximum allowable rate pursuant to 6 *Del. C.* Section 2301, beginning from the date of each payment made by the Plaintiff.

On February 13, 2013, Donald Lockwood filed a response to the Plaintiff's Cross-Motion for Summary Judgment. Specifically, Donald Lockwood argued that Louis J. Capano, Jr., one of the intended parties to the contract, never signed the 2004 CA and, therefore, no contract was formed between the parties. Additionally, Donald Lockwood joins Darin Lockwood's argument that the condition precedent was not satisfied and, therefore, the Plaintiff cannot seek contribution from him.

A hearing was held before the Court on February 20, 2013 and a decision was reserved.

STANDARD OF REVIEW

Generally, when reviewing a motion for summary judgment pursuant to Rule 56, the Court must determine whether any genuine issues of material fact exist.[1] Specifically, the moving party bears the burden of showing that there are no genuine issues of material fact so that he is entitled to judgment as a matter of law.[2] Further, the Court must view all factual inferences in a light most favorable to the non-moving party.[3] Therefore, summary judgment will not be granted if it appears that there is a material fact in dispute or that further inquiry into the facts would be appropriate.[4]

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[1] Super. Ct. R. 56(c); *Wilmington Trust Co. v. Aetna,* 690 A.2d 914, 916 (Del. 1996).
[2] *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).
[3] *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. 1990).
[4] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. Super. 1962), *rev'd in part* on procedural grounds and *aff'd in part*, 208 A.2d 495 (Del. 1965).

Additionally, the Court notes that where the parties have filed cross-motions for summary judgment, as here, "the standard for summary judgment 'is not altered.'"[5] "Moreover, the existence of cross motions for summary judgment does not act *per se* as a concession that there is an absence of factual issues."[6] "Rather, a party moving for summary judgment concedes the absence of a factual issue and the truth of the nonmoving party's allegations only for the purposes of its own motion, and does not waive its right to assert that there are disputed facts that preclude summary judgment in favor of the other party."[7] "Thus, the mere filing of a cross motion for summary judgment does not serve as a waiver of the movant's right to assert the existence of a factual dispute as to the other party's motion."[8]

DISCUSSION

Rather than examining each of the three motions individually, the Court will address the collective issues raised therein.

A. Existence of a Contract

In his Cross-Motion for Summary Judgment, Donald Lockwood raised the issue of whether the 2004 CA constituted a valid contract. In support of this contention, he stated that Louis J. Capano, Jr., one of the intended parties to the

[5] *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1050 (Del. Super. 2001 (citing *United Vanguard Fund, Inc. v. TakeCare, Inc.,* 693 A.2d 1076, 1079 (Del. 1997)).
[6] *Id.* (internal citations omitted).
[7] *Id.*
[8] *Id.*

2004 CA, never signed the 2004 CA and, therefore, reasoned that no valid contract existed between the four (4) parties.

The Court finds that the parties have proceeded in a manner that would indicate they intended to be bound by the 2004 CA. Additionally, in looking at the overarching purpose of the 2004 CA, the Court finds that it was intended to bind the two (2) companies, Milton and LBII, of which the four (4) individuals were the sole members. Essentially, the Court reads the 2004 CA as the Lockwood Defendants, incorporated as LBII, and the Plaintiff and Louis J. Capano, Jr., incorporated as Milton, each guaranteeing their share of the obligations and liabilities regarding the loans issued by WTC. Furthermore, the Court notes that the agreement under which Milton and LBII created NMDG did not require all four (4) parties' individual signatures. Instead, only Darin Lockwood and the Plaintiff as authorized members of their respective companies, LBII and Milton, signed the agreement to form NMDG as a new company. Therefore, the Court finds that there was an accepted course of dealing in which all intended parties to the contract were not required to sign individually. As such, the Court holds that Donald Lockwood's contention that the 2004 CA was not a valid contract is simply unfounded. In upholding the validity of the contract, the Court now turns to the terms of the 2004 CA.

B. 2004 CA

As previously discussed, the parties entered into the 2004 CA on December 17, 2004 in order to outline their respective obligations as guarantors of the $7.13M acquisition loan acquired from WTC. Specifically, the 2004 CA stated:

> "For an in consideration of the terms and conditions of the North Milton Development Group, LLC Agreement, the parties thereto agreed as follows:
>
> 1. As between [Darin A. Lockwood ("DAL")] and [Donald Lockwood ("DL")], on one part, and [Louis J. Capano Jr. ("LJC")] and [Louis J. Capano, III ("LIII")], on the other part, (i) DAL and DL shall, jointly and severally, be liable as guarantors for their Liability Share (as defined hereinafter) of the Acquisition Loan and (ii) LJC and LIII shall, jointly and severally, be liable as guarantors for their Liability Share of the Acquisition Loan. As used herein, "Liability Share" shall mean the share of parties hereto for any and all obligations and liabilities for the Acquisition Loan, both on single occasion and in the aggregate, being limited to the LLC Interest (as defined in the LLC Agreement), expressed as a percentage, of (i) [Lockwood Brothers II, LLC ("Lockwood")] for DAL and DL and (ii) [Milton Investments, LLC ("Investments")] for LJC and LIII.
>
> 2. Without limiting any rights and remedies available at law or in equity, in the event a demand is made by [Wilmington Trust Company (the "Bank")] on any one or more but not all of the guarantors, (i) DAL and DL shall have a right of contribution against LJC and LIII, jointly and severally, for any payments made by DAL and/or DL to Bank by reason of such demand in excess of their Liability Share, and (ii) LJC and LIII shall have a right of contribution against DAL and DL, jointly and

> severally, for any payments made by LCJ and/or LIII to Bank by reason of such demand in excess of their Liability Share."[9]

Here, the parties dispute whether WTC's e-mail correspondences with the Plaintiff constituted sufficient demand upon one or more of the guarantors and, thus, triggered the Plaintiff's right of contribution from the Lockwood Defendants. Darin Lockwood argues that an e-mail does not amount to sufficient formal demand upon a guarantor such that it would trigger this right. Furthermore, he claims that the only statements or demands for payment that WTC sent were addressed to NMDG, the borrower. Specifically, he contends that the e-mail correspondences were, at best, requests or reminders that payment was past due. The Plaintiff, however, counters that the e-mail correspondences were not only sufficient to satisfy the demand requirement and, therefore, trigger the right to contribution from the Lockwood Defendants but also that WTC sent similar communications to Donald Lockwood.

The Court recognizes that, generally, a more formal demand is made upon a guarantor by written notice that is either served personally or by means of a recognized courier. Additionally, the Court notes that the contract will often define what constitutes an acceptable means of making a demand or providing sufficient

[9] Def. Mot. Summ. J., Ex. A.

notice. Here, however, the 2004 CA did not define what constituted sufficient "demand" on a guarantor. Further, neither the circumstances surrounding the formation of the contracting companies nor the means by which the loans were secured proceeded with the utmost formality. Specifically, the Court notes that NMDG was essentially a company in name only as it was formed from an agreement between Milton and LBII, which were shell companies effectively comprised of two pairs of individuals. In addition, the Court is not surprised by the lack of formality in WTC's correspondence; WTC's failed management oversight and poor banking practices in the real estate arena ultimately led to its downfall. Nevertheless, in the Court's view, WTC's actions of sending communications via e-mail to the individual guarantors was not only sufficient to constitute demand on one or more of the guarantors but was also a method that would be generally recognized as adequate by all parties. Alternatively, the Court finds that the statements WTC sent to NMDG would also constitute sufficient demand on the guarantors because even though the loan was technically dispersed to NMDG, WTC looked to the individual guarantors for payment. Therefore, the Court holds that the Lockwood Defendants cannot support their Cross-Motions for Summary Judgment with the contention that WTC did not make sufficient demand upon one

or more of the guarantors. Having upheld the sufficiency of the demand, the Court now turns to the terms of the MRA.

C. MRA

The MRA was entered into in May 2011 by and between On Pointe Entertainment Group ("OPEG") and Darin Lockwood, William J. Lay, and Michael S. McConnell (collectively the "Sellers") because the Sellers were interested in selling their interests in OPEG, leaving the Plaintiff as the sole remaining member of OPEG. Specifically, the MRA stated:

> "11(b). The Purchaser Entities their successors, heirs and assigns do hereby, effective as of the date hereof (and the Purchaser Entities do hereby agree to do so as of the Closing Date as a condition of the Closing for the benefit of the Company), release and forever discharge the Seller Entities, and its successors and assigns from any and all causes of action, suits, claims, demands, damages, judgments, losses, penalties, expenses (including, but not limited to, reasonable attorney's fees), costs, settlements and liabilities whatsoever, whether known or unknown, liquidated or unliquidated, fixed, contingent, direct or indirect, whether at law or in equity, which the Purchaser Entities, or any one or more of them, have had or now have or may in the future have against the Seller Entities or any one or more of them, for, upon or by reason of any matter, fact or thing whatsoever from the beginning of time to the date of this Agreement, provided however, specifically excluded from the release provision of this Section shall be any obligations of the Seller Entities pursuant to the terms and conditions of this Agreement."[10]

Darin Lockwood claims that even if the 2004 CA's right of contribution was triggered, the MRA precludes the Plaintiff from pursuing this right against him.

[10] Def. Mot. Summ. J., Ex. E.

Conversely, the Plaintiff contends that the MRA only served to release Darin Lockwood from any and all claims relating to OPEG.

In looking at the contract in its entirety, rather than reading select provisions out of context as Darin Lockwood would have the Court do, it appears to the Court that the parties intended the contract to relate to OPEG matters only. Additionally, e-mail correspondences between Darin Lockwood's attorney and the Plaintiff's attorney further solidified this intent. Specifically, on May 23, 2011, Darin Lockwood's attorney sent an e-mail to the Plaintiff's attorney stating, "[t]o clarify that other than related to OPEG, Darin is not releasing any claims against L3 and vice versa in para. 11 (a) and (b)."[11] On May 24, 2011, the Plaintiff's attorney responded stating, "I agree with your clarification. Shall we have Darin and Louis sign a document acknowledging the limits on their mutual releases?"[12] Therefore, the Court does not find it necessary to expand upon the particulars of contract drafting and accompanying communications that bind contracting parties. Here, it is clear that the parties did not intend for the contract to extend beyond matters relating to OPEG and, as a result, the Court will not now read it beyond its intended scope. As such, the Court holds that Darin Lockwood cannot support his

[11] Def. Mot. Summ. J., Ex. F.
[12] Def. Mot. Summ. J., Ex. F.

Motion for Summary Judgment with the contention that the MRA precludes the Plaintiff from seeking a right of contribution against him.

D. Capano Motion

The Court has addressed the validity of the 2004 CA and the effect of the MRA, thus resolving the primary issues in the litigation. At this juncture, however, the Court is hesitant to grant the Plaintiff's Coss-Motion for Summary Judgment as there still appears to be issues of material fact that need to be developed during discovery and may affect the ultimate outcome of the litigation. As previously noted, this business deal was not conducted with the utmost formality, and as the business climate and the parties' relationship deteriorated, the Court is uncertain what may have transpired. As a result, the Court will allow the litigation to proceed for a period of time in order to allow all counsel the opportunity to untangle this transaction. The Court would suggest, however, that counsel should glean from this opinion a sense of the Court's present thinking regarding the litigation and hopefully work toward resolving the dispute.

E. Conclusion

For the foregoing reasons, Darin Lockwood's Motion for Summary Judgment is hereby **DENIED,** Donald Lockwood's Cross-Motion for Summary Judgment is hereby **DENIED**, and the Plaintiff's Cross-Motion for Summary Judgment is hereby **DENIED**.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.